INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	23
Appendix	24

Cases:

Anderson v. *Schwellenbach*, 70 F. Supp. 14 ..... 4, 17, 18-19
Board of Commissioners v. *United States*, 308 U. S. 343 .. 14
Bonwit Teller & Co. v. *United States*, 283 U. S. 258 ..... 16, 21
DuPont de Nemours & Co. v. *Davis*, 264 U. S. 456 ..... 12, 22
Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501, 4, 5, 8, 17-18, 19, 22
Filardo v. *Foley Bros.*, 297 N. Y. 217, reversed on other grounds, 336 U. S. 281 16
Grand Trunk Western Ry. Co. v. *United States*, 252 U. S. 112 ..... 12, 22
Guaranty Trust Company v. *United States*, 304 U. S. 126 14
Independent Coal Co. v. *United States*, 274 U. S. 640 21
Societe Suisse pour Valeurs de Metaux v. *Cummings*, 69 App. D. C. 154, 99 F. 2d 387, certiorari denied, 306 U. S. 631 12
Stanley v. *Schwalby*, 147 U. S. 508 14
United States v. *Craddock-Terry Shoe Corp.*, 84 F. Supp. 842, affirmed on other grounds, 178 F. 2d 760 19-20
United States v. *Harp*, 80 F. Supp. 236, affirmed on other grounds, 173 F. 761, certiorari denied, 338 U. S. 816 .. 19, 20
United States v. *Hudgins-Dize Co., Inc.*, 83 F. Supp. 593 19
United States v. *Lance*, 95 F. Supp. 327 19
United States v. *Lovknit Mfg. Co.*, 189 F. 2d 454 ..... 4, 17
United States v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120 ..... 12, 14
United States v. *Summerlin*, 310 U. S. 414 14
United States v. *Sweet Briar, Inc.*, 92 F. Supp. 777 19
United States v. *Thompson*, 98 U. S. 486 ..... 14, 22
United States v. *United Mine Workers*, 330 U. S. 258 12
United States v. *Whited & Wheless*, 246 U. S. 552 .... 12, 21-22
United States v. *Wittek*, 337 U. S. 346 13
Woods v. *Stone*, 333 U. S. 472 16

Page

Statutes:

Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U.S.C., Supp. IV, §§ 251(a), 255):
Sec. 1 ..... 13, 14, 27
Sec. 6 ..... 3, 9, 12, 16, 29
Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U.S.C. Sec. 35 *et seq.*) 2
Sec. 1 24
Sec. 2 ..... 10, 20, 25
Sec. 4 ..... 4, 20, 25
Sec. 5 ..... 10, 16, 20, 21, 26
Sec. 6 26

Miscellaneous:

93 Cong. Rec. 2088 15
93 Cong. Rec. 2130 15
Quarterly Summary of Statistics, Department of Labor, Wage and Hour and Public Contracts Division:
First quarter of 1951, fiscal year, p. 3 11
Second quarter of 1951 fiscal, p. 3 11
Third quarter of 1951 fiscal, p. 3 11
Thirty-seventh Annual Report of the Secretary of Labor, p. 89 11
Thirty-eighth Annual Report of the Secretary of Labor, p. 219 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 293

UNITED STATES OF AMERICA, PETITIONER

v.

LANCE, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on June 18, 1951.

OPINIONS BELOW

The opinion of the district court (R. 4) is reported at 95 F. Supp. 327. The opinion of the court of appeals (R. 12) is reported at 190 F. 2d 204.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the two-year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 is applicable to actions by the United States under the Walsh-Healey Public Contracts Act.

2. Whether, if applicable to an action by the United States based on an administrative determination of liquidated damages, the statute of limitations begins to run before the administrative determination has been made.

STATUTES INVOLVED

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix, *infra*, pp. 24-30, 31.

STATEMENT

This action was brought by the United States under the Walsh-Healey Public Contracts Act, 41 U. S. C. 35, *et seq.*, to recover liquidated damages of $1,990 with interest. The action was based on a decision of the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor finding the knowing employment of several underage minors in violation of stipulations required by the Act in contracts with the United States (R. 1-2).

The child labor violations in the instant case occurred from January to May 1945 (R. 3). An administrative complaint was filed on February 28, 1948 (R. 1). A trial examiner conducted a hearing on stipulated facts and reported his find-

ings and recommendations on September 10, 1948 (R. 1). The trial examiner's report was reviewed and revised by the Administrator of the Wage and Hour and Public Contracts Divisions, who found, in his decision of March 23, 1949, that the contractor owed the United States $1,990 as liquidated damages for the knowing employment of underage minors for a total of 199 days (R. 1-2). This decision became final on April 26, 1949 when the contractor sought no further review (R. 2). Upon the contractor's refusal to make payment in accordance with the administrative decision, this suit was instituted on September 7, 1949 (R. 3).

The complaint, after reciting the necessary jurisdictional allegations, merely set forth the administrative proceedings, asserted that "by reason of the findings and decision made in the proceeding set forth * * * defendant is indebted to the United States of America in the sum of $1,990.00", and demanded judgment for this amount (R. 2).

The administrative finding of knowing child labor violations was not challenged, and it was stipulated that the only question was whether the two-year statute of limitations in Section 6 of the Portal-to-Portal Act (Appendix, *infra*, pp. 30-31) barred the suit (R. 6, 9). Regarding the provision as generally applicable to the United States, the district court held the suit not barred because brought within two years of the administrative

decision. Consequently, it awarded judgment in favor of the United States.

The court of appeals reversed. It held, in reliance on the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454, that the cause of action accrued when the violations occurred, not when the administrative decision was entered, and that the action was therefore barred by the statute of limitations. (R. 12-13).[1]

REASONS FOR GRANTING THE WRIT

Congress enacted the Walsh-Healey Public Contracts Act in 1936 "to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. "The prescribed standards pertain to minimum wages, overtime compensation, non-employment of child and convict labor, and observance of certain health and safety requirements." *Anderson* v. *Schwellenbach*, 70 F. Supp. 14 (N.D. Cal.).

"The Act directs the Secretary [of Labor] to administer its provisions." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. He is empowered to "make investigations and findings" and to "prosecute any inquiry necessary to his functions." Section 4. He is further authorized to hold hearings "on complaint of a breach or violation" and "to issue orders requiring the attendance and

[1] A petition for a writ of certiorari is being filed concurrently herewith in the *Lovknit* case.

testimony of witnesses and the production of evidence under oath." His subpoenas are enforceable in the district courts. "The Secretary is directed to make 'findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor * * * shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.' (§ 5)." *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. at 503.

Pursuant to the statutory directions and authorizations, the procedure was early established in the Department of Labor, after investigations had indicated possible noncompliance, of issuing formal complaints and holding hearings before a trial examiner of the Public Contracts Division for the determination of violations of the Act. The trial examiner's report was referred to the Public Contracts Administrator for a decision which became final unless appealed to the Secretary of Labor. The administrative decision contained the formal determination of liquidated damages and became the basis for the application of the administrative sanctions provided by the Act. Upon failure of the contractor to make payment in accordance with the administrative decision after hearing, the matter was referred to the Attorney General for suit to collect the amount administratively found owing.

At the time of its enactment, no limitation was placed upon the period for enforcement by the Government of the Walsh-Healey statutory and contractual standards. There is no suggestion anywhere in the legislative debates relating to the Portal-to-Portal Act, passed some nine years later, that any abuses or evils resulted from the failure to provide a statute of limitations for Government actions under the Walsh-Healey Act.

Nevertheless, on the basis of a general reference in the Portal Act to the Walsh-Healey Act, the court below has ruled that the limitations provision of the Portal Act applies to Government actions. And, disregarding the prime importance Congress plainly attached to an administrative determination of Walsh-Healey Act violations, the court below has held that such actions are not timely even if brought within two years of the administrative determination. The decision below thus requires that the investigation of the contractor, the discovery of violations, the institution of administrative proceedings, the preparation for and conduct of hearings, the making of the initial administrative report, the completion of successive administrative appeals, the rendition of the final administrative decision, and the filing of suit by the Attorney General after failure to secure voluntary payment by the Secretary of Labor—all must be accomplished within two years, if the administrative procedure as contemplated by the statute and put

into practice by the Secretary of Labor is to be followed.

The issues presented by the imposition of this stringent requirement are of considerable importance because of the large number of pending cases in which they are involved, and the serious question as to the correctness of the decision below, in view of the statutory language, its legislative history and decisions of the federal courts inconsistent with that of the court below. Moreover, the effect of the decision, if permitted to stand, will be virtually to bring to a halt enforcement of the Walsh-Healey Act and to disrupt long standing procedures consistently followed by the Department of Labor and the Department of Justice in the administration and enforcement of the Public Contracts Act since its enactment over fifteen years ago. We do not believe that this unfortunate result is required by the terms of either the Portal or the Walsh-Healey Act. On the contrary, we submit that the proper construction of those statutes is that the Portal Act's two-year limitations period does not apply to Government actions at all, or, if it does, the period does not commence to run until the administrative proceeding has been completed.

1. (a). There are now pending in the courts and in various stages of administrative proceedings 53 cases in which this limitations question is involved.[2] The 53 cases affected represent

[2] Thirteen of these cases are in the district courts and 40 in administrative proceedings.

all but eight of the total number of actions now pending under the Act.[3] In virtually all of these cases, the claims will be entirely barred under the interpretation by the court below of Section 6 of the Portal Act.[4]

(b). Authoritative determination of the issues now is of further importance because of the severe impact of the decision below on existing administrative procedures. If allowed to stand, that decision would disrupt the entire system of enforcement procedures consistently followed by the Departments of Labor and Justice throughout the fifteen years of the Act's existence. This consequence not only emphasizes the importance of the issue here presented but also strongly suggests that the court of appeals' reading of the Portal Act is wrong because it would frustrate the Congressional purpose to "raise labor standards" through effective enforcement of the Walsh-Healey Act. *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 507.

A comprehensive review of all enforcement actions filed during this period indicates that the

---

[3] Six of these eight are saved from the effect of the present decision solely because they were filed within the 120-day grace period following enactment of the Portal Act.

[4] In 47 cases, the entire amounts of the claims are over two years old. In the remaining six cases, only a small proportion of the claim is less than two years old, and the two years probably will have elapsed for the entire amounts before administrative proceedings can be completed and action filed in court.

possibility of devising any effective enforcement procedure in conformity with the decision below is extremely remote. Proceedings to collect liquidated damages are the principal sanction for enforcing the Act. There have been 54 such civil actions. Every one of these would have been barred had Section 6 of the Portal Act, as interpreted by the court below, been in effect at the time.

The lapse of two years or more before a case reaches the stage for court action is due to a variety of factors including lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigating violations and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time.

Though the Secretary of Labor receives reasonably prompt notice of the award of a contract subject to the Act, there are far too many contracts to permit inspection in all cases. Even in normal times, appropriations permit inspections of only about one-fourth of the number of contractors each year. An attempt is made to investigate at least new contractors, *i.e.*, those who have not previously held Government contracts, prior to the completion of their first contract. But most other contractors cannot, as a practical matter, be investigated prior to the completion of their con-

tracts. Thus more than two years may have elapsed before even an inspection can be made. This problem is greatly aggravated, of course, by the tremendous current increase in the number of contractors by reason of the national emergency. The ratio of inspections to contractors has sunk to approximately 17 per cent.

No matter how expeditious the discovery and processing of Walsh-Healey Act violations, the effect of the decision below will be seriously to undermine that Act's efficacy. For even if (1) investigation results in prompt discovery of a violation, (2) the administrative hearings and interdepartmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and (3) a complaint is filed within two years from the date of the last violation, the bulk of the claim may still have been lost if the decision below stands. Unlike most causes of action which arise in full amount upon the occurrence of some event, these claims accrue from day to day and week to week as underage minors are employed or as the employer fails to pay the required wages. Thus, when an investigator discovers an employer who has been violating over the preceding two years (which, by administrative direction long antedating the decision below, is the period to which he confines his examination), one week of the two years' liability is cut off by this decision for every week which elapses before the complaint is filed in court. Even if, therefore, all

of the intervening events are accomplished within a period of two years, so little would be left of the claim as to render the sanction of liquidated damages virtually worthless.

A particularly adverse effect of the decision, then, would be to make it virtually impossible to resolve cases by amicable settlement without resort to the courts. In most cases where violations are found, under the present enforcement procedures, the contractor will voluntarily pay the damages, usually without the institution even of administrative proceedings, and court action is required in very rare instances. The importance of such amicable settlements in the program of enforcement is apparent from the fact that, in the period from July 1, 1948 through March 31, 1951, violations giving rise to a claim for liquidated damages were discovered in over 1687 cases,[5] yet it was found necessary to institute formal administrative proceedings in only 46 cases and to bring suit in only 25 cases. If the decision of the court below were to stand, the Government would be compelled to file suit even though settlement negotiations were still in progress.

Passing the additional burden on the courts that the decision below would thus impose, a limitation

---

[5] Thirty-seventh Annual Report of the Secretary of Labor, p. 89; Thirty-eighth Annual, p. 219; Quarterly Summary of Statistics, Department of Labor, Wage and Hour and Public Contracts Division, first quarter of 1951 fiscal year, p. 3; second quarter of 1951 fiscal, p. 3; and third quarter of 1951 fiscal, p. 3.

period rendering legal enforcement so impracticable would destroy all incentive to contractors to make voluntary settlements for admitted or clear violations. Obviously, the breakdown in enforcement would be accompanied by noncompliance on the part of the unscrupulous, thus frustrating the objective of the Act to use the national purchasing power to improve labor standards.

2. These highly important practical considerations are sufficient, by themselves, to raise serious doubts as to whether Congress intended Section 6 of the Portal Act (*infra,* pp. 29-30) to apply to *Government* actions under the Walsh-Healey Act. In addition, the decision below fails to give proper effect to the decisions of this Court establishing the "principle of public policy" "settled beyond doubt or controversy" that a statute of limitations does not apply to the Government unless the intention to make it apply is expressed or "clearly manifested." *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U.S. 120, 125. See also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112, 121; *Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456, 462; *United States* v. *Whited & Wheless,* 246 U.S. 552, 561; *Societe Suisse pour Valeurs de Metaux* v. *Cummings,* 69 App. D. C. 154, 99 F. 2d 387, 395, certiorari denied, 306 U.S. 631. This is but an application of the "old and well-known rule" (*United States* v. *United Mine Workers,* 330 U.S. 258, 272-273) that "a general statute imposing restrictions does not impose them upon the Government itself

without a clear expression or implication to that effect." *United States* v. *Wittek,* 337 U.S. 346, 358-359. Thus, any restriction on the Government's right to enforce remedial legislation, such as the child labor law involved here, of which there was an admittedly knowing violation, should not be imposed in the absence of a clear indication of the congressional intention to curtail enforcement.

No such intention can be spelled out from the provisions of the Portal Act or its legislative history. The evidence and implications are all in the other direction. Neither the express terms or purposes of the Act nor the legislative history lend any support to the conclusion that Congress intended the complete change in the administration and enforcement of the Public Contracts Act that the decision below would entail. On the contrary, the statement of purposes in Section 1(a) of the Portal Act (see Appendix, *infra,* pp. 28-30) and the legislative debates reveal that Congress was concerned with problems incidental to employees' suits and not with basic enforcement procedures by the Government. The over-all purpose of the Portal Act, as its name implies, was to relieve employers of what Congress regarded as "windfall" claims by employees for minor "preliminary" or "postliminary" activities. The specific purpose of the limitations period was to remedy the problems arising out of "the varying and extended periods of time * * * under the laws of the several States" (Sec-

tion 1(a)).[6] State statutes of limitations, of course, are applicable to employee suits only, and have no application to the United States. *United States* v. *Summerlin,* 310 U.S. 414, 416. *United States* v. *Thompson,* 98 U.S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U.S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U.S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 132; *Board of Commissioners* v. *United States,* 308 U.S. 343, 351. It would therefore be a serious distortion of the legislative purpose of the Portal Act, to construe it as applicable to the United States, thus requiring a complete change in the Government's basic methods of administration and enforcement.

That the limitation period was not directed at actions by the United States is further confirmed by the legislative debates which plainly show that the Walsh-Healey Act was brought within the Portal Act not to curtail governmental actions but because of the Congressional concern over the possibility of employee suits. The principal proponents of the legislation when called upon to explain reference to the Walsh-Healey Act despite

---

[6] The entire paragraph in Section 1(a) under "Findings and Policy" with respect to the statute of limitations reads as follows:

> The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

the absence of portal suits under that Act, repeatedly answered, not that it was intended to bar Government suits, but that it was necessary to bar possible employee suits. Senator Donnell, who was chairman of the Senate subcommittee which considered the bill, and who guided the legislation through the Senate, stated that "there is unquestionably a right on the part of employees * * * to assert their rights under the Bacon-Davis or the Walsh-Healey [Public Contracts] Act. The mere fact that, so far as I know, no such claims [for portal-to-portal pay] have been made is not at all conclusive as to whether or not such claims have been made or hereafter will be made." 93 Cong. Rec. 2088. Similarly, Senator Cooper, a member of the Senate subcommittee which considered the measure, stated that "even though as yet no suits have been filed under those [Bacon-Davis and Public Contracts] acts, the contingent liability exists * * * and it seems to me that contracts entered into under these two acts present a contingent liability. *There is the opportunity for employees to sue* * * *" (93 Cong. Rec. 2130; italics supplied).

If it should eventually be established that employees cannot maintain their own actions under the Walsh-Healey Act, this would be no evidence that the statute was intended to apply to the United States as the only party to which it could apply. The clear intention to bar employee suits obviously cannot be converted into an intention to do some-

thing else because Congress may ultimately prove to have been mistaken as to the right of employees to sue. Cf. *Filardo* v. *Foley Bros.*, 297 N.Y. 217, reversed on other grounds, 336 U.S. 281.

3. But even if actions by the Government for liquidated damages under the Walsh-Healey Act are governed by the Portal Act and must be commenced "within two years after the cause of action accrued" (Section 6), the statute begins to run from the date of the Labor Department decision, and not from the date of the violations as held below. For it is well settled that a cause of action based upon an administrative determination accrues, within the meaning of statutes of limitation, only after the administrative determination has been made. *Woods* v. *Stone,* 333 U.S. 472; *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258. The practical considerations outlined above (*supra,* pp. 7-12) strongly reinforce the application of the established rule to Government suits under the Walsh-Healey Act.

Since the suit in this case was to recover on the administrative finding of liability for liquidated damages in the amount of $1,990, made in accordance with the express authorization of Section 5 of the Act (R. 26), and not upon the direct violation of the Walsh-Healey Act, it is squarely within this rule.

The court below held, however, that accrual of the cause of action did not hinge upon the adminis-

trative decision on the theory that the Walsh-Healey Act does not contemplate hearings by the Department of Labor as the basis for suits and that the Attorney General may proceed without awaiting an administrative decision. See *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454, 458 (C.A. 5), relied on by the court below. This conclusion is in square conflict with this Court's description of the administrative functions of the Secretary of Labor in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, the views of a specially constituted three-judge court in the ninth judicial circuit in *Anderson* v. *Schwellenbach*, 70 F. Supp. 14, and the decisions of five district courts entered before the ruling of the court below. See *infra*, pp. 19-20.

In the *Endicott Johnson* case, this Court described the functions of the Secretary of Labor under the Walsh-Healey Act in terms which leave no doubt as to the Congressional contemplation of an administrative determination by the Secretary of Labor as a condition precedent to enforcement.

"The Secretary [of Labor] *is directed* to make 'findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States * * *'. * * * The Act *directs* the Secretary to administer its provisions. * * * Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts. One

of her *principal functions* is the conclusive determination of questions of fact * * *. She could not perform her full *statutory duty* until she examined underpayments wherever the coverage extended * * *. It is the only basis on which she can compute liquidated damages *as she is required to do.* * * * The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation *as Congress had directed her to do* * * *. To perform her function she *must* draw inferences and make findings * * *." 317 U.S. at 503, 507-509; emphasis supplied.

Similarly, in the *Anderson* case, the court stated that "Administration of the act is entrusted to the Secretary of Labor who is authorized to make investigations and findings or to delegate these functions to representatives. Among other sanctions the act provides that violation of its standards renders the contractor liable to the United States for liquidated damages in the sum of $10 per day for each infringement of the child and convict labor standards and a sum equal to the amount of underpayments for violation of the minimum wage and overtime standards. Sums due the Government by reason of such violations may be withheld from any amounts owing on such contracts or may be recovered in suits brought by the Attorney General in the name of the United States. * * * *The ultimate administrative determination*

affords the basis for the withholding of sums or the institution of suit by the Government." 70 F. Supp. at 15, emphasis supplied.

Although the court below reached the same result as the Fifth Circuit Court of Appeals, five different district judges, prior to the court's decision in the instant case, reached an opposite conclusion. They did so in reliance upon the same understanding of the prime importance of the administrative determination under the Walsh-Healey Act that is evidenced in the *Endicott Johnson* and *Anderson* cases, *supra,* and all held the Government's action for liquidated damages not barred if brought within two years after the administrative determination. *United States* v. *Hudgins-Dize Co., Inc.,* 83 F. Supp. 593 (E.D. Va., Bryan, J.); *United States* v. *Harp,* 80 F. Supp. 236 (W.D. Okla., Broaddus, J.), affirmed on other grounds, 173 F. 2d 761 (C.A. 10), certiorari denied, 338 U.S. 816; *United States* v. *Craddock-Terry Shoe Corp.,* 84 F. Supp. 842 (W.D. Va., Paul, C.J.), affirmed on other grounds, 178 F. 2d 760 (C.A. 4); *United States* v. *Sweet Briar, Inc.,* 92 F. Supp. 777 (W.D. S.C., Wyche, J.); *United States* v. *Lance, Inc.,* 95 F. Supp. 327 (W.D. N.C., Warlick, J.) (the instant case). This rationale most clearly appears in the carefully reasoned opinion of District Judge Paul in the *Craddock-Terry Shoe Corp.* case, *supra,* dealing specifically with the statute of limitations point involved here (84 F. Supp. at 846):

> It seems the plain intendment of the statute that administrative proceedings, consisting of the hearing, the findings of fact, and the decision of the Secretary, shall be the process whereby the Secretary determines whether the United States has a claim and the amount of it; and only when this has been determined and the contractor has refused payment, is resort to be had to the courts. The administrative proceedings appear to be a prerequisite to an assertion of the claim for damages; and it would appear that not until the conclusion of these proceedings with the Secretary's decision does the Government have a right of action in the courts for collection of the damages. * * *

Although four of these decisions were rendered in the fourth judicial circuit and, therefore, are overruled by the decision below, the *Harp* case, which arose in the tenth judicial circuit, still remains outstanding and in conflict with the decision below.

The view that the Act contemplated suit in advance of an administrative determination can be reached only by a fragmentary reading of the statute, separating the sentence in Section 2 providing that suits shall be brought by the Attorney General, from the detailed provisions of Sections 4 and 5 confiding the administration of the Act in the first instance to the Secretary of Labor. It overlooks the important fact that statutory violations are, unlike ordinary breaches of contract, not self-

revealing and that, under the statutory scheme, the Attorney General would have no basis for proceeding except upon the request of, and the information supplied by, the Secretary of Labor.[7]

But even if the Attorney General can bring suit without a prior administrative determination, the statute clearly authorizes, if it does not require, a suit based on the administrative decision. And if the period of limitations on a direct action begins to run from the time of the violation, this does not mean that the period begins to run from the same time upon the separate cause of action to enforce an administrative determination.

If two causes of action are available in a given set of circumstances, one based upon an administrative determination of liability and another directly upon the statute, the one is not barred merely because the other, if brought, would have been. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258. See also *United States* v. *Whited & Wheless,* 246 U.S. 552, and *Independent Coal Com-*

[7] The suggestion that the administrative proceeding might be held simultaneously with the court action is not only inconsistent with the terms and context of Section 5 of the Walsh-Healey Act, but is quite impracticable. The various district courts may be expected to differ widely in their procedures, some insisting on immediate court trials without waiting for the administrative decision, some inclined to submit the issues to juries, and others to masters. Some courts may also question the propriety of delegating the determination of liability to the Secretary of Labor after suit has been brought at his request. In these circumstances the administrative proceeding which is the heart of the statute would be relegated to a minor or completely insignificant role.

pany v. *United States,* 274 U.S. 640, 650. " 'If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.' And the principle has frequently been recognized by this and other courts." *United States* v. *Whited & Wheless, supra,* at 564. Thus, regardless of when a cause of action based on a direct suit by the Attorney General might be deemed to accrue, the present cause of action did not accrue until the amount of the damages due had been fixed by administrative determination under the Walsh-Healey Act.

The fact that under this rule there is no period of limitations upon the commencement of administrative proceedings does not argue against its correctness. That was the situation in *Woods* v. *Stone, supra.* Moreover, the lack of any bar by limitations upon the enforcement of public law is not an unusual condition. On the contrary, it is "an element of the English law from a very early period." *United States* v. *Thompson,* 98 U.S. 486, 489; see also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *Du Pont de Nemours & Co.* v. *Davis,* 264 U.S. 456; *United States* v. *Whited & Wheless,* 246 U.S. 552. Particularly is there no inequity where, as here, the statute "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in

the contract." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. There would certainly seem to be no substantial policy reason for imposing a statute of limitations on Government suits relating to the knowing child labor violations involved in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

APPENDIX

1. The pertinent portions of sections 1, 2, 4, 5 and 6 of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. §§ 35, 36, 38, 39) provide as follows:

> Sec. 1. * * * That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> * * * * *
>
> (c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; * * *
>
> (d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; * * *
>
> * * * * *

Sec. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than

minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

* * * * *

Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the

production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

Sec. 6. * * * The Secretary of Labor may

provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

2. Sections 1(a) and 6 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. IV, §§ 251(a), 255) provide as follows:

Sec. 1(a). The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and

the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by con-

sequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * *

Sec. 6. Statute of Limitations.—Any action

commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 943394 103